

DEC 20 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MANUEL A. OSETE ESPINOZA,

Petitioner - Appellant,

v.

SYLVIA FELIX OSETE,

Intervenor - Appellee,

TONY ESTRADA,

Respondent - Appellee.

No. 05-15283

D.C. No. CV-04-00015-RCC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted December 5, 2005
San Francisco, California

Before: TROTT, T.G. NELSON, and PAEZ, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Petitioner-Appellant Manuel A. Osete Espinoza appeals the Arizona district court's denial of his 28 U.S.C. § 2254 petition on two grounds. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.¹

Espinoza's first ground – that the Arizona Superior Court's decision that he could pay his bail was unreasonable in light of the evidence – fails. Evidence adduced at the state court hearing showing that Espinoza refused his daughter's offer to sell his property to pay his bail belies Espinoza's claim that he cannot generate funds while in prison. The record further showed that Espinoza was able to obtain cash to give to his daughter and to deposit cash into her bank account while in prison. In addition, Espinoza points to no evidence explaining the whereabouts of the \$420,000 he removed from his joint bank account with his ex-wife, or challenging the state court's findings that he continues to control lucrative businesses in Mexico. Espinoza's mere allegations that he cannot work or sell his assets from prison do not satisfy his heavy burden under § 2254(d)(2)'s highly deferential standard.² Thus, we cannot conclude that the state court's decision was

¹ At oral argument, Sylvia Felix Osete, the real party in interest in this case, affirmatively waived the issue of whether Espinoza had exhausted his state remedies. *See* 28 U.S.C. § 2254(b)(1), (3).

² *See Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004).

unreasonable in light of the evidence the parties presented.³ Accordingly, we affirm on this ground.

Espinoza’s second ground also fails because the state court’s decision was neither contrary to, nor an unreasonable application of, *International Union, United Mine Workers of America v. Bagwell*.⁴ The state court correctly concluded that Espinoza’s contempt order was coercive, not punitive, because he had the ability to purge it.⁵ Espinoza’s contempt is indistinguishable from the “paradigmatic” civil contempts discussed in *Gompers v. Buck’s Stove & Range Co.*,⁶ and his bail amount was intended to compensate his ex-wife for his failure to pay her the monthly maintenance amounts pursuant to the couple’s separation

³ See *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (stating that the “‘unreasonable application’ clause requires the state court decision to be more than incorrect or erroneous . . . [but] objectively unreasonable”); see also *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (stating that “a federal court may not second-guess a state court’s fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable”).

⁴ 512 U.S. 821 (1994); 28 U.S.C. § 2254(d)(1).

⁵ *Bagwell*, 512 U.S. at 837 (holding that a court’s imposition of a fine is punitive if the contemnor has no opportunity to purge it through some action other than full payment once imposed).

⁶ 221 U.S. 418, 442 (1911) (explaining that a court’s indefinite confinement of a contemnor until he complies with its order to pay alimony is coercive, not punitive); see *Bagwell*, 512 U.S. at 837.

decree.⁷ In light of the state court’s finding that Espinoza was capable of paying his bail, we cannot conclude that his contempt was serious enough to be punitive.⁸ Thus, the state court’s decision that Espinoza’s contempt was coercive was not contrary to *Bagwell*.⁹ Consequently, we affirm on the second ground.

AFFIRMED.

⁷ See *Bagwell*, 512 U.S. at 829 (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303–04 (1947) for the proposition that a fine intended to compensate the victim for her losses as a result of the contemnor’s failure to comply with a court order is coercive, not punitive).

⁸ See *id.* at 837–38 & n.5.

⁹ See *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003) (“A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result.”).